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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93M-604

In re Applications of)	MM DOCKET NO. 93-107	32437
DAVID A. RINGER)	File No. BPH-911230MA	
ASF BROADCASTING CORPORATION)	File No. BPH-911230MB	
WILBURN INDUSTRIES, INC.)	File No. BPH-911230MC	
SHELLEE F. DAVIS)	File No. BPH-911231MA	
OHIO RADIO ASSOCIATES, INC.)	File No. BPH-911231MC	
For Construction Permit for)		
an FM Station on Channel 280A,)		
in Westerville, Ohio)		

SEP 22 3 24 PM '93
FCC MAIL SECTION

MEMORANDUM OPINION AND ORDER

Issued: September 20, 1993 ; Released: September 22, 1993

1. Shellee F. Davis seeks a ruling on a "Motion to Enlarge Against ASF Broadcasting, Inc." She filed her motion on August 20, 1993 and wants the following financial issue added against ASF:

"To determine whether ASF Broadcasting Corporation was financially qualified at the time its application was filed, and if not, the effect thereof on his basic qualifications to be a Commission licensee."

2. ASF opposed Davis' motion on September 7, 1993, and Davis replied on September 17, 1993.

Preliminary Ruling

3. Davis' motion is late-filed. Timely motions to enlarge should have been filed on or before May 24, 1993. See 47 CFR 1.229(b)(2) and 58 F.R. 21580 published April 22, 1993.

4. Davis argues that her motion is timely. She says that ASF's principal was deposed on July 13, 1993,¹ and a transcript of that deposition became available on August 10, 1993. So, says Davis, her motion is based on the discovery of new facts and is timely filed under 47 CFR 1.229(b)(3).

5. That argument is rejected. Almost all of her allegations have been available to Davis since December 30, 1991, when ASF filed their

¹ The reason the ASF principal was deposed on July 13, 1993 is because that's when her opponents elected to depose her.

application. In any event, automatic document production took place on May 10, 1993. So there is no excuse for Davis not having her financial allegations firmed up by June 9, 1993.²

6. Davis had no right to wait until after depositions were taken before moving to enlarge issues against their opponent. In fact the Commission has admonished her not to do so. See Discovery Procedures, 12 FCC 2d 185 (1968) at para 7. This tactic of waiting until after discovery has been completed before filing additional motions to enlarge the issues is a procedure that should be discouraged. It prolongs hearings and frequently leads to two-phase or even three-phase hearings.³

Ruling

7. Since Davis' motion is untimely, her allegations must be analyzed under the Commission's reassessed Edgefield-Saluda doctrine. See Adjudicatory Re-Regulation Proposals, 58 FCC 2d 865 (1976) and 47 CFR 1.229(c). There (at 873-874) the Commission said this:

"...An untimely motion to enlarge will be considered fully on its merits only if it raises a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of its untimely filing. It is expected that this standard will be strictly construed."

² Davis didn't file her enlargement request against ASF until after the parties had exchanged their direct case exhibits, and on the same day the Evidentiary Admission Session was held. So Davis is obviously fishing for a Phase II hearing.

³ At the present time the adjudicatory processors (the Trial Judges, the Review Board, and the Adjudication Division of the General Counsel's office) are giving untimely post-designation petitions to enlarge issues the run-of-the-mill treatment. We seldom analyze such petitions as they should be analyzed; i.e., akin to an infrequent request for extraordinary relief. Consequently, the filing of untimely post-designation enlargement petitions has become a routine, almost automatic practice. So we end up squandering judicial system resources, fostering adjudicatory inefficiency, and sanctioning trial by ordeal.

Our nonchalant processing of untimely enlargement requests obviously accrues to the tactical advantage of the RAMBO litigator. It permits him to delay the outcome of the proceeding, and it gives him an additional bargaining chip at the settlement table.

Moreover, it must be remembered that granting an untimely petition to enlarge changes the basic fabric of the proceeding, reshapes the litigation, and alters the strengths and weaknesses of the parties involved. Adjudicatory processors would do well to give untimely petition to enlarge the proverbial "hard look" before granting or denying them.

8. Giving Davis's allegations the strict construction they deserve they fail to pass muster. She accuses ASF of failing to include items in their budget estimates operating costs. These accusations do not qualify as questions of probable decisional significance. Nor can it be said that her allegations raise any questions of such substantial importance that they warrant a Phase II hearing.


9. Even assuming Davis's allegations were timely filed, they would still be rejected for any one of three reasons. First, and since her allegations are financial allegations, they must meet the standard the Commission laid down in Revised Processing Applications, 72 FCC 2d 202 (1979) at 222 (para.60). This record shows that ASF faces \$90,000 in construction and operation expenses. They have \$208,000 available to meet those construction and operation expenses. Thus, Davis has failed to show that ASF has misrepresented their finances or grossly omitted some decisionally significant financial item that would render their proposal totally defective.

10. Secondly, and even applying the less stringent standards of 47 CFR 1.229(d), Davis hasn't pleaded with the required sufficiency and specificity to warrant adding the issue she seeks.⁴ Davis asserts that ASF has failed to account for a shortfall of some \$43,000. But even crediting that argument, the excess of available funds over construction and operating expenses (para. 8 supra.) carries the day.

11. Third, and finally, ASF has shown that they made a good faith attempt to budget the costs of construction and operation of their station and that they are financially qualified to follow through on his proposal.⁵

SO the "Motion to Enlarge The Issues Against ASF Broadcasting, Inc." that Shellee Davis filed on August 20, 1993, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION


Walter C. Miller
Administrative Law Judge

⁴ 47 CFR 1.229(d) governs timely motions to enlarge. It provides in pertinent part that "[s]uch motions shall contain specific allegations of fact sufficient to support the action requested. . ."

⁵ ASF obviously is depending on the financial wherewithal of Thomas J. Beauvais. Beauvais is to contribute \$750 in capital stock, \$5,250 of additional paid-in capital, \$30,000 of additional paid in capital (if needed), further paid-in capital of \$60,000 (if needed), and is willing to loan the Corporation \$100,000. There is absolutely no indication Beauvais cannot fulfill those commitments.